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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. BENECIO FRUCTUOSO QUINONES, Defendant and Appellant.	F076114 (Super. Ct. No. BF167233A) **OPINION**

APPEAL from a judgment of the Superior Court of Kern County. Judith K. Dulcich, Judge.

Randy S. Kravis, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Louis M. Vasquez, Lewis A. Martinez, Sarah J. Jacobs, and Amanda D. Cary, Deputy Attorneys General, for Plaintiff and Respondent.

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INTRODUCTION

A jury convicted defendant Benecio Fructuoso Quinones of driving under the influence and causing bodily injury to another person (Veh. Code, § 23153, subd. (a); count 1) and leaving the scene of an accident that resulted in death or permanent serious injury (*id.*, § 20001, subd. (b)(2); count 3) after he drove his truck through a red light into a motorcyclist, and then fled the scene of the accident. The jury also found true allegations that he personally inflicted great bodily injury within the meaning of Penal Code section 12022.7, subdivisions (a) and (b). In a bifurcated proceeding, the trial court also convicted defendant of possession of an open container containing alcohol in a vehicle (*id.*, § 23223; count 4).

On appeal, defendant contends the trial court erred in admitting evidence of his prior conviction for driving under the influence in violation of his due process rights; the trial court committed prejudicial error and also violated his due process rights by failing to advise him of his *Boykin-Tahl* rights (*Boykin v. Alabama* (1969) 395 U.S. 238; *In re Tahl* (1969) 1 Cal.3d 122) before he stipulated the victim's treating physician would testify the victim slipped into a coma as a result of his head injury such that the jury's true finding on the great bodily injury enhancement allegation under Penal Code section 12022.7, subdivision (b) should be vacated; and, finally, that his conviction for leaving the scene of an accident should be reversed because he was not advised of his *Boykin-Tahl* rights before his trial counsel conceded guilt on that count during closing argument.

We affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

In February 2017, defendant ran a red light at an intersection, hit motorcyclist Favian Valdez, and then drove away. Evelyn Williams, a surgical assistant and registered certified medical assistant, witnessed the accident. Williams's car was stopped facing north behind Valdez's motorcycle at the red light at the intersection. When the light turned green, Williams saw Valdez drive approximately halfway through the intersection

when a truck approached from the east at approximately 50 miles per hour, ran the red light, entered the intersection, and hit the back of the motorcycle where Valdez's legs were on the footrests causing his helmet to come off and knocking him "all the way across the street" where he "hit the curb." Williams jumped out of her car and placed her hand under Valdez's head. According to Williams, Valdez's "brain was coming out of the back of his head," "[t]here was blood coming out of his ears," [h]e was screaming and trying to move," and "his leg had what they call a compound fracture. It was just—it was broken off" such that she could see the bone. The paramedics picked up Valdez and took him away in an ambulance and Williams spoke to police.

John Jackson also witnessed the accident. He was about to turn at the intersection when he saw a white truck hit the motorcycle. The truck "just kept going" and Jackson pursued it. He pulled up beside the truck in the opposite lane of traffic and yelled at defendant, the driver. He said "sir, you need to go back to the accident. That is very bad. You need to return back to the scene." Defendant appeared to acknowledge Jackson, said "yeah, I need to return," and made a turn. According to Jackson, defendant seemed very tired or "shaken up" and did not seem really alert. Jackson could not discern whether defendant was intoxicated but he noted defendant spoke in a "slurred manner." Jackson again positioned his car behind defendant's to follow him and "that is when [defendant] pulled into [an] apartment complex." Jackson did not want to approach defendant, so he left. Police later went to Jackson's house and he identified defendant as the truck driver from a six-pack photographic lineup. Jackson also identified defendant in court as the driver of the truck.

Officer Kameron Bailey investigated the accident scene and determined where the impact occurred in the intersection. She noted there were "gouge marks" in the asphalt on the road, which "are usually created by force applied into the asphalt usually from the collision … from the vehicle being pushed with force along the roadway."

Following the accident, Officer Chad Ott was in route to the scene when he received notice another officer had located the truck involved in the accident in an alley. Officer Ott diverted to the alley where he came upon the truck, which had obvious signs it had been in a collision. When Officer Ott searched the truck he found multiple beer cans, including a 25-ounce Budweiser beer can in a brown bag on the driver's seat that appeared to have been "freshly emptied," additional cans of Bud Light (some sealed and others open), a bottle of Modelo beer with residual beer in it on the floorboard, and both full and empty beer cans in the backseat. Officer Ott "suspected that the driver of that vehicle had been consuming beer," and his investigation evolved into a driving under the influence (DUI) investigation. The People introduced photographs of the inside of the truck depicting "numerous beer cans" at trial.

Officer Ott and other officers spoke to nearby witnesses and obtained a general description of the driver. Officer Ott eventually went back to the police station. At 7:48 p.m., he received notice defendant was at the police station and wanted to turn himself in. Officer Ott met with defendant and recorded their subsequent conversations. The People played the recorded conversations for the jury. Officer Ott testified he smelled alcohol on defendant's breath. He conducted a horizontal gaze nystagmus test and concluded, based on his investigation, the field sobriety tests, defendant's watery eyes, and the odor of alcohol, defendant was not intoxicated when Officer Ott spoke to him, but defendant had consumed alcohol at some point earlier that day.

In his statement, defendant admitted he was going 55 miles per hour and was not paying attention to the light when he hit the motorcycle. He saw the motorcyclist fly towards the corner. Defendant said he left because he was scared since he has a number of tickets. He drove the car to an alley and then ran. He denied drinking on the day of the accident, stating he does not drink, though he admitted that he used to and has previously received DUI tickets. Officer Ott did a breathalyzer test at 8:13 p.m. and informed defendant that it confirmed he had been drinking earlier. Defendant again

denied drinking that day, but when Officer Ott informed him that his blood-alcohol level was 0.027 percent and asked if he was probably drunk earlier when he was driving, defendant responded "Yeah." Defendant then admitted he had approximately two 25-ounce cans of beer between 10:00 a.m. and 12:00 p.m. on the morning of the accident. Officer Ott conducted two more breath tests at 8:37 p.m. and 8:40 p.m., which reflected defendant's blood-alcohol level at 0.013 and 0.012 percent, respectively. According to Ott, the accident occurred at 3:12 p.m. Using an average rate at which a person's body eliminates alcohol, 0.02 percent per hours, Officer Ott estimated defendant's blood-alcohol concentration to have been approximately 0.127 percent at the time of the accident, which occurred approximately five hours before his initial breath test.

Officer Ott arrested defendant, read him his rights pursuant to *Miranda v. Arizona* (1966) 384 U.S. 436, and defendant told him again what happened that day. Defendant reported leaving the scene of the accident because he was scared since he had been drinking; he had two 25-ounce beers that day. He stated he used to drink approximately 48 beers a day for over 20 years and tried to stop after he got a second DUI. He was sent to Alcoholics Anonymous.

Carmen Barrera testified she worked at a taco truck in Kern County. She had known defendant for many years because he would visit the truck once a week to get food and he used to shop at a store where she previously worked. She recalled taking defendant's order on the day of the accident between 1:30 and 2:30 p.m., and defendant appeared to be drunk. Defendant was mumbling, his eyes were red, and Barrera could smell the odor of alcohol. Barrera recalled defendant driving 40 or 50 miles per hour in the parking lot, which she deemed to be "too fast."

Valdez, the victim, testified he did not recall the accident. He remembered riding his motorcycle through the intersection and then the next thing he recalled was waking up in the hospital. Valdez's partner explained Valdez "was in what they called a coma." "He was not conscious. He did not respond when you would try to talk to him. He didn't

move." When Valdez awoke days later, he did not know what day it was and did not recognize his wife, daughter, parents, or other family. He thought it was years earlier. He felt pain all over his body—mainly in his head but also in his back, chest, ribs, hip, and legs.

Valdez lost count of the number of times he visited the doctor after the accident; he was still seeing the doctor at the time of trial. He had approximately 12 procedures after the accident, including a craniotomy, an exploratory surgery, a muscle graft to cover the lost muscle in his shin, and a plate installed in his hip from where the ball joint punctured through. The accident caused Valdez's skull to cave in, causing pressure in his head. He also had scrapes where the padding of his helmet tore off skin and he cracked a tooth. He broke his shoulder and three ribs and his lungs collapsed. The bone in his right knee tore through his muscle and skin and he also had damage to his ankle and foot. Valdez had an at-home nurse come to change his bandages. At trial, the People introduced photographs of Valdez's injuries following the accident.

Defendant was charged with willfully and unlawfully, while under the influence of alcohol, driving a vehicle which proximately caused bodily injury to Valdez in violation of Vehicle Code section 23153, subdivision (a) (count 1) enhanced by an allegation he personally inflicted great bodily injury within the meaning of Penal Code section 12022.7; willfully and unlawfully driving a vehicle with a blood-alcohol level of 0.08 percent or more, which proximately caused bodily injury to Valdez in violation of Vehicle Code section 23153, subdivision (b), enhanced by an allegation he personally inflicted great bodily injury within the meaning of Penal Code section 12022.7 (count 2); driving a vehicle involved in an accident resulting in death or permanent serious injury to Valdez in violation of Vehicle Code section 20001, subdivision (b)(2) (count 3). Before trial, the parties stipulated to a bifurcated bench trial as to count 4, an infraction for possession of an open container of alcohol while driving a vehicle, and the enhancement allegations as to counts 1 and 2 for defendant's prior conviction from October 4, 2007.

The jury convicted defendant of counts 1 and 3 and could not reach a verdict as to count 2, resulting in a mistrial on that count. The jury also found true the great bodily injury enhancement as to count 1 and the court found defendant guilty of count 4.

DISCUSSION

I. Admissibility of Evidence of Defendant's Prior Conviction

Defendant challenges the trial court's admission of evidence related to his previous conviction for driving under the influence of alcohol in violation of Vehicle Code section 23152, arguing it was more prejudicial than probative.

A Relevant Procedural History

Before trial, defendant moved to exclude the portion of his statement to police in which he discussed his previous DUI conviction. His counsel argued:

> "Anything related to a prior driving under the influence of alcohol mentioned, I think it has less relevance—relevant bearing on this case as opposed to its prejudicial value. The prejudicial value, which I think is obvious, I think once they hear that he's driven under the influence before, they are going to assume that he is doing it again.
>
> "The probative value would be it is not that he actually did run. We are not even contesting that. It would just be towards his consciousness of guilt. The reduced probative value—I think there is even a further reduction of probative value because Officer Ott is the one who feeds him the line, saying you have drank and driven before, I believe, and that is why you ran. And with regard to that, I'll submit."

The prosecutor argued the probative value of such evidence outweighed its potential for prejudice:

> "In terms of the—focusing just on the mention by the defendant that he has DUI's, I would disagree with the anticipated testimony that it was fed to him by Officer Ott. Officer Ott asked him why he ran, and that is his choice of words and his choice of explanation and, specifically, motive as to why he ran, as to why he was scared. He goes on to state that he knows he is in trouble and that he has prior DUI's.
>
> "It is our position that this is very different from, say, a fourth-time felony DUI where the three prior DUI's would very likely not be relevant

or admissible in the trial for the fourth as they are not a required part of the evidence, but they would be unduly prejudicial in the sense that it would suggest well, he has three before, why doesn't he have four? Of course he does. So it would be inadmissible character evidence. Very different here.

"I think we have—while he may have a prior DUI, he is being charged for a DUI with injury, but it goes to the fleeing aspect, which is a completely separate charge.

"So if the Court looks at it, in comparing the past conduct, which was a DUI, to the current charge, which is [a] hit and run, they are not the same charge, and the one explains the other. I think it does go to motive, and while that is not an element or a defense, one way or the other, for either side, it helps explain to the jury the nature of the act, why he fled, why someone would flee. It closes any questions that they might have as to what happened that day and why.

"And the Court has to look at the 352 analysis, obviously. I don't think there is any issue with it taking an undue consumption of time. There are parts of sentences strewn throughout the audio interview of [defendant]. So the question doesn't create a substantial danger of undue prejudice confusing the issue or misleading the jury. I think it does the complete opposite. It ties the story together, what happened that day and why there was no one left at the scene where there is this horrific accident where there is a guy laying on the ground bleeding out next to a motorcycle, and the truck that hit him is gone. The question is why, why did that person flee?

"Yes, part of the elements is did he flee? And that is what we have to prove, but it will aid the Prosecution in explaining to the jury why it all makes sense, why he fled, especially with the fact that he later turned himself in, and our theory—I know the Court kind of has seen the whole theory of this whole story five hours later, but why would he wait five hours later if there was not this underlying DUI issue as well as the current alcohol in the system that he was worried about?

"So it helps explain and rationalize why there was this waiting period and him trying to escape culpability for his actions. [¶] … [¶]

"But I also think it plays, in part, to the Prosecution's theory that he will be metabolizing at a higher rate because he is an alcoholic, and I know the Court hasn't seen all the evidence, it has a preview as to some of it.

"Part of that, I think, having a prior DUI will weigh into that, as well as the fact that he will tell the officer his very, very detailed history of

> drinking, including drinking two 24 packs per day for 24 years, his self[-]admission to having an alcohol problem. Two weeks prior he lost control, drank 30 beers, and passed out, and this all ties into our theory of proving why he will then be metabolizing at the rate that the officer sees, which is in excess of what he has been trained to look for regarding people who drink heavily. Whether the Court calls it an alcoholic or not, it substantiates the theory that he is a heavy drinker, and, therefore, would have a higher metabolizing rate. [¶] … [¶]
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> "… Lastly, I think our position is furthered by … the CALCRIM that we are going to ask to be considered, I think it is 3550, motive, and that is something that the jury can consider when making their determination of guilt, that it is not a deciding factor, and I think that the motive here was the fear of the consequences of that prior DUI."

After weighing the potential for prejudice against its probative value, the court held admissible defendant's statements regarding his prior DUI convictions and alcoholism. It noted that defendant's statements regarding his "prior DUI's or prior convictions or alcoholism" were "highly prejudicial," but "[t]hey not only explain the motive for the hit and run, the flight, it could be argued they are an admission of guilt because why would someone flee unless they were under the influence?" The court explained it understood "there is a prejudicial aspect to it, but the probative value is large. It does clearly explain why someone would flee. It explains why [defendant] would flee from an accident scene, and his knowledge that what he did was wrong and violated the law." The court concluded "it is also an inference that he was under the influence, and that is why he fled. So … it is twofold. It is very probative." It reasoned such evidence "is not going to consume a large amount of time," "[i]t is not going to confuse the issues," and "[i]t is not going to mislead the jury." The court explained it would "give a limiting instruction to the jury, informing them that they may only consider that portion of the statement referring to prior DUI's with respect to the issue of motive and Count 3, the hit and run." The court noted, though motive was not an element of establishing a hit and run, the jury could consider it, and it explains why the offense happened.

The parties later stipulated on the record: "[Defendant] has a prior driving under the influence conviction from November 30th, 2007." The court instructed the jury: "You have heard evidence that the defendant has a prior driving under the influence conviction. This evidence may only be used for consciousness of guilt and not for the purpose of determining the defendant's actions on the date of February 9, 2017."

B. Standard of Review and Applicable Law

Evidence of prior criminal acts is ordinarily inadmissible to show a defendant's disposition to commit such acts. (Evid. Code, § 1101, subd. (a).) But such evidence may be admissible when relevant to prove a fact in issue, such as motive, opportunity, intent, knowledge, identity, or the existence of a common design or plan. (*Id.*, subd. (b).) The California Supreme Court has held subdivision (b) of Evidence Code section 1101 clarifies that "'[e]vidence that a defendant committed crimes other than those for which he is on trial is admissible when it is logically, naturally, and by reasonable inference relevant to prove some fact at issue, such as motive, intent, preparation or identity. [Citations.] The trial court judge has the discretion to admit such evidence after weighing the probative value against the prejudicial effect. [Citation.] When reviewing the admission of evidence of other offenses, a court must consider: (1) the materiality of the fact to be proved or disproved, (2) the probative value of the other crime evidence to prove or disprove the fact, and (3) the existence of any rule or policy requiring exclusion even if the evidence is relevant. [Citation.] Because this type of evidence can be so damaging, "[i]f the connection between the uncharged offense and the ultimate fact in dispute is not clear, the evidence should be excluded." [Citation.]' [Citation.]" (*People v. Fuiava* (2012) 53 Cal.4th 622, 667.)

Section 352 of the Evidence Code affords the trial court discretion to exclude evidence if its probative value is "substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger

of undue prejudice, of confusing the issues, or of misleading the jury." "[T]he court's exercise of discretion will not be disturbed on appeal except upon a showing that it was exercised in an arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice." (*People v. Brown* (2011) 192 Cal.App.4th 1222, 1233.) "[S]tate law error in admitting evidence is subject to the traditional [*People v. Watson* (1956) 46 Cal.2d 818] test: The reviewing court must ask whether it is reasonably probable the verdict would have been more favorable to the defendant absent the error." (*People v. Partida* (2005) 37 Cal.4th 428, 439.) Federal due process is offended only if admission of the evidence renders the trial fundamentally unfair. (*Ibid.*)

C. Analysis

Defendant argues the trial court abused its discretion in admitting evidence of his prior conviction for driving under the influence of alcohol because such evidence was more prejudicial than probative. He argues the prior conviction "was not relevant to the two charges of driving under the influence and driving with a BAL of 0.08 or higher," and the jurors were permitted to infer, based on the prior conviction, that he "was more likely to have driven under the influence on this particular occasion because he had done so in the past." He contends such evidence was cumulative given defendant "confessed to causing the accident and leaving the scene during his interview with Officer Ott." He further argues "[t]he probative value of [his] prior DUI also was reduced by the fact that it is common knowledge that it is against the law to drive while intoxicated," so, "[t]he prosecutor did not need to introduce evidence that [he] suffered a prior DUI conviction to show that he knew it was illegal to drive while intoxicated," particularly given the other evidence of his consciousness of guilt and CALCRIM No. 372. He argues the admission of such evidence rendered his trial "fundamentally unfair" in violation of his due process rights. The People respond such evidence was relevant to issues of "knowledge, motive,

and to explain [defendant's] actions of fleeing the scene so that evidence of his blood alcohol levels would dissipate and because of his consciousness of guilt."

Even assuming, arguendo, the trial court erred in admitting evidence of defendant's prior conviction for driving under the influence, we cannot conclude defendant was prejudiced. The jury was given a limiting instruction regarding the use of the conviction. It was instructed that such evidence could only be used as evidence related to consciousness of guilt and not for the purpose of determining defendant's actions on the date of the accident. We presume the jury followed this instruction. (See *People v. Avila* (2006) 38 Cal.4th 491, 574; see also *People v. Hendrix* (2015) 214 Cal.App.4th 216, 247 ["A limiting instruction can ameliorate [Evidence Code] section 352 prejudice by eliminating the danger the jury could consider the evidence for an improper purpose"].) Indeed, the jury acquitted defendant of driving with a blood-alcohol level of 0.08 percent or higher, undermining a conclusion that it used defendant's prior conviction to establish his conduct on the date of the offense with regard to all of the charged offenses. And, unlike in *People v. Hendrix* upon which defendant relies, the jury was not instructed it should consider the similarity between the prior uncharged offense and the charged offense without being instructed on how such similarity should be considered. (*Id.* at pp. 247–248 [given instruction was "confusing" and, in light of irrelevant and inflammatory evidence, was not presumably followed].)

Additionally, the evidence supporting defendant's convictions for driving under the influence and failing to perform a legal duty following a vehicle accident was strong. Defendant himself admitted he drank two 25-ounce beers the morning before the accident and that he ran the red light, hit Valdez, and fled the scene. In addition to defendant's own admissions, Barrera testified defendant appeared intoxicated less than two hours before the accident, the breathalyzer test results established defendant had alcohol in his system a few hours after the accident, Jackson testified defendant did not appear alert immediately following the accident, the truck defendant was driving had numerous beer

cans both open and sealed in it, and Jackson and Williams identified defendant as the driver of the truck involved in the accident.

Moreover, the trial court did not admit evidence of the details of defendant's prior conviction beyond the fact of conviction, and the evidence presented did not consume an undue amount of time. Additionally, contrary to defendant's argument, we cannot conclude the prosecutor exacerbated any alleged prejudicial effect from the evidence's admission; he did not argue the jury should consider defendant's prior DUI as evidence of defendant's propensity to drive under the influence but rather referenced this prior conviction in discussing defendant's explanation for his flight from the scene of the accident. (Cf. *People v. Hendrix, supra,* 214 Cal.App.4th at p. 251.)

Accordingly, we cannot conclude it is reasonably probable the verdict would have been more favorable to defendant if evidence of defendant's prior conviction for driving under the influence was excluded. (See *People v. Watson*, *supra*, 46 Cal.2d at p. 836; *People v. Marks* (2003) 31 Cal.4th 197, 226–227 ["we have held the application of ordinary rules of evidence like Evidence Code section 352 does not implicate the federal Constitution, and thus we review allegations of error under the 'reasonable probability' standard of *Watson*"].) We also cannot conclude defendant has satisfied the high constitutional standard to show the admission of evidence of his prior conviction deprived him of a fair trial and was so prejudicial as to render the trial "fundamentally unfair."

II. Advisement of *Boykin-Tahl* Rights

In arguments 2 and 3 of his opening brief, defendant argues the trial court reversibly erred in failing to advise him of his *Boykin-Tahl* rights before he agreed to stipulate to the substance of the anticipated testimony of the victim's treating physician, and before his counsel conceded guilt as to count 3 during closing argument because both the stipulation and the concession essentially amounted to guilty pleas.

A. Relevant Procedural Background

Before the close of evidence, the parties stipulated on the record:

> "If called to testify, Dr. Victor Sorenson, a board-certified doctor and Kern Medical Center director of surgery, would confirm the injuries testified to by Favian Valdez. In addition, that Mr. Valdez suffered internal bleeding and exploratory surgery, multiple spinal fractures, T11 and T12, and skull base fractures. Further, that at KMC on February 9th, 2017, Favian Valdez initially was communicating with hospital staff but subsequently slipped into a coma caused by a head injury."

During closing argument, defense counsel argued defendant was not drunk when he was driving on the date of the accident. Accordingly, he argued, the prosecution had not met its burden of establishing one of the elements of counts 1 and 2. He, however, conceded defendant's guilt as to count 3, stating:

> "Now, Count 3, hit and run with injury, there is no doubt in my mind that that happened. There shouldn't be any doubt in any of your minds that that happened. It is clear that while driving, [defendant] was involved in a vehicle accident. He ran through a red light, and he hit Mr. Favian [*sic*], causing catastrophic injury to him. That was Count 2 or element two.…
>
> "The defendant knew he had been involved in an accident that injured another person. From his words, it is fairly clear that he knew what had happened. You might even notice that in one of the photos, there is a pool of oil where the vehicle may have come to a brief stop or pause before it drove off. [¶] And from the nature of the accident, obviously, that someone was injured. You hit a motorcycle at that speed, the motorcyclist is going to be hurt.
>
> "Now, the defendant willfully failed to perform one or more of the following duties. We can read the jury instructions. We don't need to go through all of those. It is clear he took off. He didn't complete any of the duties he was supposed to."

Defense counsel also noted they were "not contesting elements one, three or four in either … counts [1 or 2]": "[Defendant] drove that vehicle. He ran that red light, and he caused bodily injury to Mr. Favian [*sic*]. Was he under the influence of an alcoholic beverage? That is the question. And was he .08?"

B. Standard of Review and Applicable law

The United States Supreme Court held in *Boykin v. Alabama*, *supra*, 395 U.S. 238, that it would not presume from a silent record that in pleading guilty a defendant in a state criminal trial had validly waived his rights to jury trial, against compulsory self-incrimination, and to confront his accusers. (*Id.* at p. 243.) It recognized that a guilty plea "is more than a confession which admits that the accused did various acts; it is itself a conviction; nothing remains but to give judgment and determine punishment." (*Id.* at p. 242; see *People v. Adams* (1993) 6 Cal.4th 570, 575 (*Adams*).) The court further observed:

> "What is at stake for an accused facing death or imprisonment demands the utmost solicitude of which courts are capable in canvassing the matter with the accused to make sure he has a full understanding of what the plea connotes and of its consequence. When the judge discharges that function, he leaves a record adequate for any review that may be later sought [citations], and forestalls the spin-off of collateral proceedings that seek to probe murky memories." (*Boykin v. Alabama, supra,* 395 U.S. at pp. 243–244, fn. omitted; *Adams, supra,* 6 Cal.4th at pp. 575–576).

In *In re Tahl*, *supra*, 1 Cal.3d 122, the California Supreme Court concluded that, in every case in which a guilty plea is entered, "the record must contain *on its face* direct evidence that the accused was aware, or made aware, of his right to confrontation, to a jury trial, and against self-incrimination, as well as the nature of the charge and the consequences of his plea. Each must be enumerated and responses elicited from the person of the defendant." (*Id.* at p. 132; see *Adams, supra,* 6 Cal.4th at p. 576.) "At a minimum *Boykin* required 'a specific and express enumeration and waiver by the accused of the three constitutional rights surrendered by a guilty plea ….' [Citation.]" (*Adams, supra,* at p. 576.) If the record does not reflect compliance with this mandate, the error in entering judgment on the defendant's plea of guilty was error that was reversible per se. (*Ibid.*) Accordingly, "[u]nder the *Boykin-Tahl* rule, a guilty plea is not valid unless the record reflects (1) the defendant had been advised of and waived his right to a jury trial,

to confront and cross-examine witnesses, and against self-incrimination [citation], or (2) the plea is voluntary and intelligent under the totality of the circumstances." (*People v. Gaul-Alexander* (1995) 32 Cal.App.4th 735, 746.)

The prophylactic *Boykin-Tahl* requirements are not limited to pleas of guilty. (*Adams, supra*, 6 Cal.4th at p. 576.) However, they are not "applicable to an evidentiary stipulation which does not admit the truth of the allegation itself or every fact necessary to imposition of the additional punishment other than conviction of the underlying offense." (*Id*. at p. 580.)

"'Sometimes, a defendant's best defense is weak. He may make a tactical decision to concede guilt as to one or more of several counts as part of an overall defense strategy. A submission under these circumstances is not a slow plea, and the trial court is not constitutionally compelled by *Boykin* and *Tahl* to administer the guilty-plea safeguards to assure that the tactical decision is voluntary and intelligent.…' [Citation]" (*People v. Gaul-Alexander, supra*, 32 Cal.App.4th at p. 749.)

C. Analysis

Defendant contends the court committed reversible error by failing to advise him of his *Boykin-Tahl* rights before his counsel stipulated to the substance of Dr. Sorenson's anticipated testimony and his counsel's statement in closing argument that defendant was not contesting guilt on count 3 for leaving the scene of an accident resulting in permanent serious injury. He asserts the enhancement for great bodily injury pursuant to Penal Code section 12022.7, subdivision (b) should be vacated and his conviction for count 3 should be reversed as a result of the trial court's error. We address and reject each of defendant's contentions in turn.

1. The parties' stipulation regarding the substance of Dr. Sorenson's testimony did not implicate defendant's **Boykin-Tahl** *rights*

Defendant first argues his stipulation regarding what Dr. Sorenson would testify to was "tantamount to a guilty plea on the great bodily injury enhancement allegation." We disagree.

"When a defendant who has asserted and received his right to trial, and has waived none of his constitutional rights, elects to stipulate to one or more, but not all, of the evidentiary facts necessary to a conviction of an offense or to imposition of additional punishment on finding that an enhancement allegation is true, the concerns which prompted the *Boykin* holding are not present." (*Adams*, *supra*, 6 Cal.4th at p. 581.) In *Adams*, the prosecutor alleged an enhancement that the defendant committed the charged offense while on bail or released on his own recognizance pending other charges (Pen. Code, § 12022.1), and the defense stipulated the alleged offense was committed while the defendant was on bail or on his own recognizance. (*Adams*, *supra*, at p. 574.) On appeal, the defendant argued his stipulation was void because the court had not complied with the *Boykin–Tahl* requirements of advisements and waivers. (*Adams*, at p. 575.) The California Supreme Court disagreed. It observed that in other contexts *evidentiary* stipulations need not be preceded by advisements and waivers. (*Id.* at p. 577; e.g., *People v. Hovey* (1988) 44 Cal.3d 543, 567 [defendant charged with murder with kidnapping special circumstances allegation; stipulation concerning identity of kidnapper and that defendant caused injuries that ultimately led to victim's death did not require advisements and waiver].) Accordingly, the *Adams* court concluded a defendant's stipulation to some, but not all, of the evidentiary facts or elements necessary to the imposition of punishment on a charged enhancement, as opposed to an admission of the truth of an enhancing allegation, did not trigger the *Boykin–Tahl* requirements. (*Adams*, *supra*, at p. 580.) The court held, though the duty to comply with the *Boykin–Tahl* requirements is not limited to guilty pleas, in the context of the bail/recognizance enhancement allegation, a stipulation

to being on bail, standing alone, does not cover every fact necessary to the imposition of additional punishment. (*Adams*, at pp. 577–580.) Rather, the trier of fact must also find the defendant is guilty of or has been convicted of the primary offense. (*Id*. at p. 580.)

Here, the jury found true the enhancement allegation as to count 1 that in the commission of count 1 defendant "personally inflicted great bodily injury upon Favian Valdez," "which cause[d] the victim to become comatose due to brain injury or to suffer paralysis of a permanent nature" in violation of Penal Code section 12022.7, subdivision (b). To establish the great bodily injury enhancement to count 1, the People had to prove that defendant personally inflicted great bodily injury on Valdez during the commission of the crime, and defendant's acts caused Valdez to become comatose due to brain injury. (See *ibid*.) The jury was instructed that great bodily injury means "significant or substantial physical injury … that is greater than minor or moderate harm." (CALCRIM No. 3161.)

As in *Adams*, defendant's stipulation as to the anticipated substance of Dr. Sorenson's testimony did not cover every fact necessary to the imposition of additional punishment. Rather, the jury also had to find defendant personally inflicted great bodily injury on Valdez during the commission of the offense, where great bodily injury "means significant or substantial physical injury." (CALCRIM No. 3161.) Here, defendant did not admit he committed the offense as to count 1; rather, his defense was that he did not drive while intoxicated. He also did not admit that he personally inflicted great bodily injury during the commission of the offense.

Because defendant did not admit every element of the great bodily injury allegation, defendant's stipulation was not the equivalent of an admission to the Penal Code section 12022.7, subdivision (b) enhancement. Thus, the *Boykin*/*Tahl* advisements and waivers were not required. (See *People v. Hall* (1979) 95 Cal.App.3d 299, 315–316 ["We do not view this stipulation as an admission of a crime nor of any of the elements of a crime. The stipulation merely recites that if called, [the doctor] would testify

concerning the nature and extent of injuries he observed on the victim. [The doctor] would not testify that those injuries were inflicted by the defendant, nor that they constituted 'great bodily injury' within the meaning of the law. Whether those injuries were inflicted by defendant and whether they constitute great bodily injuries are factual questions for determination by the jury. The stipulation which allowed the jury to consider testimony of the doctor did not operate to remove that fact-finding obligation from the jury"].)

Accordingly, we reject defendant's second contention.

2. Defense counsel's concession in closing argument did not implicate defendant's Boykin-Tahl *rights*

Defendant next argues his conviction on count 3 should be reversed because he was not advised of his *Boykin-Tahl* rights before his counsel conceded guilt as to count 3 during closing argument. Again, we disagree.

In *People v. Cain* (1995) 10 Cal.4th 1 (*Cain*), defense counsel told the jury during argument the defendant was guilty of burglary and multiple felony murder. (*Id.* at pp. 29–30.) On appeal, the defendant argued these statements were the equivalent of a guilty plea on those charges, and therefore the trial court was required to obtain a plea waiver. (*Id*. at p. 30.) The court rejected this argument, holding "trial counsel's decision not to contest, and even expressly to concede, guilt on one or more charges at the guilt phase of a capital trial is not tantamount to a guilty plea." (*Ibid*.) It further held, "It is not the trial court's duty to inquire whether the defendant agrees with his counsel's decision to make a concession, at least where, as here, there is no explicit indication the defendant disagrees with his attorney's tactical approach to presenting the defense." (*Ibid*.) Our Supreme Court has reiterated this holding in numerous cases. (See *People v. Lucas* (1995) 12 Cal.4th 415, 446 ["It is … settled that counsel's concession of guilt on one or more charges at the guilt phase of a capital trial is not the equivalent of a guilty plea, requiring defendant's express waiver"]; see also *People v. Freeman* (1994) 8 Cal.4th 450,

497; *People v. Griffin* (1988) 46 Cal.3d 1011, 1029; *People v. Hendricks* (1987) 43 Cal.3d 584, 592-594.)

In support of his argument, defendant relies upon *People v. Lopez* (2018) 28 Cal.App.5th 758 in which the Second Appellate District initially held defense counsel's concessions during argument regarding the defendant's guilt as to the second count for a felony hit and run were tantamount to a guilty plea on that count, and the record failed to affirmatively show the defendant voluntarily and intelligently waived his rights. (*Id.* at pp. 764–768.) But, as defendant and the People note, the *Lopez* decision was subsequently vacated and, on rehearing, the Second District, following *Cain*, held defense counsel's concession as to the hit and run charge was not the equivalent of a guilty plea. (See *People v. Lopez* (2019) 31 Cal.App.5th 55, 63–66.)

Here, as in *Cain* and *Lopez*, defense counsel's tactical concession on count 3 did not amount to a guilty plea. (*Cain*, *supra*, 10 Cal.4th at p. 30.) This concession was not a stipulation admitting the elements of count 3 as an evidentiary matter, and it did not alter the People's burden to prove defendant's guilt on count 3 beyond a reasonable doubt. (See *People v. Lopez*, *supra*, 31 Cal.App.5th at p. 64.) Additionally, the record is devoid of an explicit indication defendant disagreed with his attorney's tactical approach to presenting the defense. (*Cain*, *supra*, at p. 30; see generally *McCoy v. Louisiana* (2018) __ U.S. __, __ [138 S.Ct. 1500, 1506–1510]; *Florida v. Nixon* (2004) 543 U.S. 175, 192.) Accordingly, the trial court was not required to give defendant the *Boykin*/*Tahl* waivers and advisements as to count 3 such that reversal on that count is warranted. (See *People v. Gaul-Alexander*, *supra*, 32 Cal.App.4th at pp. 749–750 [*Boykin-Tahl* advisements not required where defendant "vigorously defended against the charges brought against her" and "[i]n closing argument, her counsel apparently made a tactical decision to offer the jury a chance to compromise its verdict by only convicting her of one charge—the one least likely to inhibit her ability to secure work in her profession"; and "[n]othing in the record support[ed] an inference that the facts recited in the stipulation were inaccurate or

that, without the stipulation, they would not have been easily proved by the prosecution"]; *People v. Lopez*, *supra*, 31 Cal.App.5th at pp. 63–66 [defense counsel's concession of guilt during argument on hit-and-run charge was not tantamount to a guilty plea].)

We reject defendant's third contention.

DISPOSITION

The judgment is affirmed.

_____
PEÑA, J.

WE CONCUR:

_____
DETJEN, Acting P.J.

_____
FRANSON, J.